56620-2

56620-2

79252-6

56620-2-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

LEO C. BRUTSCHE,

Appellant.

vs.

CITY OF KENT, a Washington municipal corporation,

Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT CITY OF KENT

Chloethiel W. DeWeese, WSBA #9243
Richard B. Jolley, WSBA #23473
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861 / (206) 223-9423 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Statutes

Rules

INTRODUCTION

This lawsuit arose out of Leo Brutsche's claim that the City of Kent should be liable for physical damage to various doors and door jambs caused by the Special Response Team (SRT), a specially trained group of police officers, during the execution of a search warrant for a suspected methamphetamine lab located on Brutsche's property. The search warrant was obtained based on probable cause to believe that James Brutsche (Leo Brutsche's son, who lived in a mobile home on the premises) was involved in the illegal manufacture of methamphetamines. As described in more detail below, when the police arrived on the scene, James Brutsche barricaded himself inside the mobile home, and was so combative that it was necessary to use a taser against him to effectuate his arrest.

Leo Brutsche claims that, during the execution of this criminal search warrant, and despite the obvious risk of injury or death posed to both the police and innocent bystanders, the police should have stopped and allowed Mr. Brutsche to use his keys to open doors to the various buildings subject to this warrant. In pursuing this lawsuit, Mr. Brutsche has chosen to ignore those risks, and has also consistently refused to acknowledge his son's involvement with illegal drugs. As described more fully below, James Brutsche subsequently died in a methamphetamine lab

explosion that occurred on the same premises where this search warrant was executed.

I. STATEMENT OF THE CASE

A. COUNTER-STATEMENT OF FACTS

On July 8, 2003, the Honorable Linda G. Thompson of the King County District Court, Renton Division, signed a search warrant authorizing the search of an abandoned warehouse, various outbuildings, eight semi-trailers, and a pink and white mobile home located at 426 Naden Avenue in an industrial area in Kent. CP 316-318. The search warrant specifically authorized the police to search James F. Brutsche, plaintiff's now deceased son, as well as any locked containers and numerous abandoned or disabled vehicles parked within the fenced boundary at the Naden Avenue address. CP 316. Plaintiff Leo C. Brutsche has at all relevant times owned the property subject to the search warrant.

The Special Response Team, which consists of specially trained officers from a variety of south King County jurisdictions, was called out to execute the search warrant because of the high risk nature of executing warrants on methamphetamine labs. CP 43-44, 46-47. Unfortunately, as discussed below, this particular search (which took place on July 10, 2003) was "compromised" when James Brutsche and another suspect saw

the police from their vantage point on the porch of the mobile home where James Brutsche resided. CP 44, 48. As the SRT arrived in several fully marked police vehicles, and with officers in clearly marked police uniforms, an announcement was made three times over a police vehicle loud speaker that the police had arrived with a search warrant for 426 Naden Avenue. CP 48. As soon as James Brutsche saw the police approaching the main residence, he ran inside the trailer home, slammed the sliding glass door shut, and attempted to barricade himself inside by placing a dowel at the bottom of the sliding door. CP 44, 48. For this reason, it was necessary to use a breaching device to gain access to the mobile home. CP 44, 48. Once the glass door was breached, Brutsche remained combative and uncooperative, and physically fought with the police officers trying to arrest him. CP 45, 49. It was necessary to use a taser against Mr. Brutsche so that he could be taken into custody. CP 45, 49.

After James Brutsche was apprehended and placed in custody, the police proceeded to search the remaining areas subject to the search warrant, including the abandoned warehouse, several open outbuildings, eight semi-trailers and the various abandoned or disabled vehicles located within the fenced compound. CP 45, 49. It was necessary to breach several interior warehouse doors to effectuate the search warrant. CP 45,

49. The SRT needed to gain access to the remaining buildings as quickly as possible because of obvious safety concerns for the police officers. CP 45, 49. It was unknown whether other people on the premises might also be dangerous or non-compliant, or attempting to destroy evidence of methamphetamines on the premises. CP 45, 49. While the various buildings were being searched, a secure perimeter was also set up by the police to prevent any unaccounted for suspects from escaping, and to avoid possible contamination of the crime scene. CP 49.

While Leo Brutsche claims that he arrived while the subject search was underway, and offered to use his keys to open various doors for the police, it would have violated the SRT's standard operating procedure to allow Mr. Brutsche access to a potential crime scene until after the search had been completed. CP 50. This procedure not only maintained the integrity of the potential crime scene, but also ensured the safety of both innocent bystanders and the police in a very high risk environment. CP 50.

Although the search was "compromised," as described above, this does not change the fact that the police had probable cause to obtain this search warrant, specifically information causing them to believe that James F. Brutsche was involved in the illegal manufacture of methamphetamines. CP 316. While the police did not find any drugs or

code violations during this particular search, plaintiff's son (James Brutsche) died in a methamphetamine lab explosion that occurred in the mobile home located on his father's property approximately one year later. CP 250, 251.

B. PROCEDURAL HISTORY RELEVANT TO ISSUES PRESENTED FOR REVIEW

Leo Brutsche filed this lawsuit against the City of Kent in May 2004, and subsequently amended his complaint to add King County as a defendant. CP 3, 4. In November 2004, this matter was transferred (at Brutsche's request) to arbitration. CP 228. King County settled with Brutsche prior to the arbitration hearing, which took place on March 23, 2005. CP 41. On April 6, 2005, arbitrator William G. Simmons issued a written arbitration award. CP 233-234. The arbitrator awarded $2,400.00 to Mr. Brutsche, as well as costs in the amount of $235. CP 234. The arbitrator credited the City of Kent with a $2,500.00 settlement payment previously made by King County, for a net award to Brutsche in the amount of $135.00. CP 234.

Brutsche filed a Request for a Trial de Novo with the King County Superior Court on April 19, 2005. CP 236. During the next couple of months the City's attorneys spent a substantial amount of time not only researching and preparing a summary judgment motion, but also

responding to Brutsche's numerous discovery requests and preparing for trial. CP 259-261.

On June 24, 2005, the City filed a motion seeking summary judgment dismissal of all plaintiff's claims against the City. CP 51; CP 53-67. Oral argument on the motion was heard by the Honorable Brian D. Gain on July 22, 2005. CP 51. On that date, Judge Gain granted the City's motion for summary judgment, dismissing plaintiff's lawsuit in its entirety with prejudice. CP 225-226.

On July 27, 2005, Brutsche filed a Notice of Appeal to the Division I Court of Appeals, seeking review of the trial court order granting the City's motion for summary judgment of dismissal.

On September 8, 2005, the City filed a motion seeking recovery of $27,124.00 in attorney's fees from Brutsche pursuant to MAR 7.3. CP 263-283. The trial court considered this motion based on the written submissions of both parties, and without oral argument. CP 263. By order dated September 16, 2005, Judge Gain signed Findings of Fact, Conclusions of Law and an Order awarding the City fees in the amount of $4,050.00 -- less than 15% of the amount requested. CP 293-296. On September 19, 2005, Mr. Brutsche filed an Amended Notice of Appeal seeking review of the trial court's award of attorney's fees.

On September 26, 2005, the City brought a trial court motion seeking reconsideration of the amount of fees awarded by Judge Gain. CP 297-309. On November 18, 2005, after reviewing additional written submissions by both parties, Judge Gain signed an Order on Civil Motion denying the City's motion for reconsideration of the amount of attorney fees awarded. CP 321. The trial court refused the City's request for oral argument in connection with its motion, and failed to provide any explanation for the nominal fees it awarded the City.[1]

On December 5, 2005, the City filed a Notice of Appeal to the Division I Court of Appeals, seeking review of Judge Gain's November 18, 2005 order denying its motion for reconsideration of the fees awarded to the City.

II. ASSIGNMENTS OF ERROR

A. RESPONDENT CITY OF KENT ASSIGNS NO ERROR TO THE TRIAL COURT'S JULY 22, 2005 SUMMARY JUDGMENT RULING IN THIS CASE. THE CITY SEEKS A RULING AFFIRMING THE HONORABLE BRIAN D. GAIN'S ORDER GRANTING DEFENDANT CITY OF KENT'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL.

B. THE TRIAL COURT ERRED IN AWARDING LESS THAN 15% OF THE ATTORNEY FEES THE CITY WAS ENTITLED TO PURSUANT TO MAR 7.3.

---

[1] The court ignored the City's request for oral argument set forth in both its motion for reconsideration and in a September 22, 2005 letter prepared by counsel for the City. See CP 297, 310.

C. **THE TRIAL COURT ERRED IN FAILING TO CREATE A SUFFICIENT RECORD FOR THE APPELLATE COURT TO REVIEW THE AMOUNT OF ATTORNEY FEES AWARDED.**

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. **WHETHER THE TRIAL COURT PROPERLY GRANTED THE CITY'S MOTION FOR SUMMARY JUDGMENT DISMISSING BRUTSCHE'S LAWSUIT AGAINST IT WHERE:**

1. Prior to the July 10, 2003 search of Mr. Brutsche's property, the police had probable cause to believe that his son, James F. Brutsche, was manufacturing methamphetamines on the premises, and obtained a valid search warrant signed by King County District Court Judge Linda G. Thompson;

2. The steps taken by the Special Response Team to execute this search warrant were reasonable, necessary and constituted a valid exercise of police power;

3. Any property damage sustained by Brutsche during the execution of this search warrant did not constitute a compensable taking because it resulted from the proper exercise of police power;

4. Brutsche's negligence claim against the City failed as a matter of law, since he had no cause of action for "negligent infliction of property damage" in connection with the execution of this search warrant;

5. Trespass law was inapplicable because the police conducted the search of Brutsche's property pursuant to a valid warrant;

6. RCW 10.93 authorized the police to execute this search warrant regardless of the existence of any interlocal agreement; and

7. Brutsche had no viable basis for asserting a § 1983 claim because he sustained no constitutional deprivation resulting from a City policy or custom.

B. WHETHER THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR RECONSIDERATION OF THE NOMINAL ATTORNEY FEES IT AWARDED TO THE CITY PURSUANT TO MAR 7.3 WHERE:

1. MAR 7.3 required the court to award costs and reasonable attorney fees to the City because Brutsche failed to improve his position on the trial de novo;

2. Although the City incurred $27,124 in reasonable attorney fees after Brutsche filed his request for a trial de novo, and submitted detailed documentation in support of that amount, the court awarded only $4,050 – less than 15% of the fees actually incurred by the City; and

3. In summarily denying the City's motion for reconsideration, without explanation, the court refused to comply with MAR 7.3's mandate that it award reasonable attorney fees.

C. WHETHER THE TRIAL COURT FAILED TO CREATE A SUFFICIENT RECORD REGARDING THE AMOUNT OF ATTORNEY FEES AWARDED WHERE:

1. The court's Findings of Fact, Conclusions of Law, and Order Awarding Attorney Fees to the City contained no findings as to the basis for the court's award or its rationale in determining the nominal amount awarded; and

2. Although specifically requested, the trial court refused to allow oral argument in connection with the City's motion for reconsideration of the amount of fees awarded.

IV. LEGAL AUTHORITY

A. THE SPECIAL RESPONSE TEAM'S ACTIONS WERE BOTH REASONABLE AND NECESSARY AND CONSTITUTED A VALID EXERCISE OF POLICE POWER.

It is undisputed that the Special Response Team's search of Mr. Brutsche's property on July 10, 2003 was authorized by a valid search warrant signed by King County District Court Judge Linda G. Thompson. As required by law, issuance of the search warrant was based on a specific finding that there was probable cause to believe that James F. Brutsche was involved in the illegal manufacture of methamphetamines on the premises.[2] As set forth in the declarations of both Lt. Mike Villa and

[2] The manufacture, delivery or possession with intent to manufacture methamphetamines is a serious offense under Washington's Controlled Substances Uniform Act, punishable

Officer Darin Majack (CP 43-50), the execution of a search warrant on a suspected methamphetamine lab is a high risk endeavor that is not appropriate for regular police officers, and requires the expertise of the Special Response Team. There was a distinct potential for violence in executing this warrant, which was born out by James F. Brutsche's violent response to the police officers' efforts to arrest him. As reflected in the declarations of the officers, people involved in the methamphetamine trade are typically paranoid, irrational, and often armed and dangerous. CP 44, 47.

The search warrant specifically authorized the Special Response Team to search the following:

- An old abandoned, non-operational manufacturing warehouse with an unknown number of office units inside, and several open outbuildings, about eight semi trailers and a white and pink mobile home located at the address of 426 Naden Ave, Kent, County of King, State of Washington.
- Numerous abandoned or disabled vehicles parked within the fenced compound of the previously stated warehouse/residence.
- Any locked containers: such as filing cabinets, safes, and storage containers at the previously stated warehouse/residence ...
- And person of James F. Brutsche, white male, born on 06/26/1958, 5'-11" tall, and about 160 with brown hair and brown eyes.

---

by up to ten years in prison and a fine of between $25,000 and $100,000 depending on the quantity of drugs involved. RCW 69.50.401(a) (ii).

As set forth in Lt. Villa's declaration, VNET[3] detectives had reported that the property owner (Leo Brutsche) allowed multiple suspected drug users to sleep/live throughout the property. CP 47. In short, the Special Response Team was confronted with a volatile, dangerous situation when the officers involved executed this search warrant. It was necessary to breach the sliding glass door that James Brutsche locked and barricaded in order to apprehend Brutsche. CP 44, 48. In addition, it was necessary to breach various other warehouse interior doors to avoid seriously compromising police safety, and to minimize the likelihood that evidence of methamphetamines would be destroyed. CP 45, 49.

It is well established that "the police may take whatever steps are reasonably necessary in executing duly authorized warrants." *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1376 (9th Cir. 1989), citing *Dalia v. United States*, 441 U.S. 238, 257-58, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979). In *Dalia*, the U.S. Supreme Court specifically noted that officers executing search warrants on occasion must damage property in order to perform their duty, and this is permissible under the Fourth Amendment. *Dalia,* 441 U.S. at 258. Furthermore, execution of a search warrant does not become unreasonable solely because the search could

[3] Valley Narcotic Enforcement Team

have been accomplished by less intrusive means. *Torrey v. Tukwila*, 76 Wn. App. 32, 44, 882 P.2d 799 (1994).

While Leo Brutsche claims that he offered his keys to Special Response Team officers, so that they would not have to damage various "doors, windows and other property," the police were certainly not required to jeopardize either their safety or the safety of other people to protect Brutsche's personal property. As reflected in Lt. Mike Villa's declaration, not allowing Mr. Brutsche access to the property during the execution of this search warrant was critical in reducing the risk of injury or death to both the police and innocent bystanders in a very high risk environment, and also maintained the integrity of the potential crime scene. CP 49, 50.

B. PROPERTY DAMAGE RESULTING FROM THE PROPER EXERCISE OF POLICE POWER PURSUANT TO A VALID SEARCH WARRANT DOES NOT CONSTITUTE A COMPENSABLE TAKING.

1. Police Power and the Power of Eminent Domain Are Two Distinct and Separate Powers of Government.

Mr. Brutsche's assertion that the minimal property damage he sustained during the execution of this search warrant constituted a compensable constitutional "taking" is without merit, and was properly rejected by the trial court. Throughout this litigation, Brutsche has improperly relied on the doctrine of eminent domain, which has no

relevance to this case, and has persistently ignored the distinction between the exercise of police power and the power of eminent domain. Pursuant to eminent domain, the State is empowered to take real property for public use, but must compensate the owner appropriately. Washington Constitution, Article I, §16. Brutsche's attempt to merge the power of eminent domain with the police power exercised in this case is improper, since these constitute completely separate powers of government. *Eggleston v. Pierce Co.*, 148 Wn.2d 760, 767, 64 P.3d 618 (2003). This distinction was clearly articulated by the court in *Eggleston*:

> Police power and the power of eminent domain are essential and distinct powers of government . . . Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain. But clearly, not every government action that takes, damages, or destroys property is a taking. "Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, *or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the pubic.*"
>
> 148 Wn.2d at 767-768 (emphasis in original, citing *Conger v. Pierce County*, 116 Wash. 27, 36, 198 P. 377 (1921), additional citations omitted).

2. <u>Damage to private property pursuant to the State's police power is not a compensable taking under Washington Constitutional Article I, §16, which governs the State's power of eminent domain</u>.

In the *Eggleston* case, the Supreme Court specifically held that property damage to a house, sustained during the execution of a search warrant by police, was not a compensable taking because it was the result of the valid exercise of police power and not the exercise of the State's power of eminent domain. In doing so, the court specifically analyzed Washington constitutional history, "the continuing vitality of the separate doctrines of eminent domain and police power," and concluded that "extending takings to cover this alleged deprivation of rights would do significant injury to our constitutional system." *Eggleston*, 148 Wn.2d at 773, 775.

In *Eggleston*, the police rendered plaintiff's home uninhabitable when it removed a load bearing wall pursuant to a search warrant issued in connection with a murder charge against her son. After examining the Washington State Constitution, and citing and discussing cases from other jurisdiction, the court concluded:

> After a careful survey, we are aware of no case that holds or even supports the proposition that the seizure or preservation of evidence can be a taking.

148 Wn.2d at 770.

Brutsche's attempt to limit the holding in *Eggleston*, by claiming that it applies only to the preservation (as opposed to the gathering) of evidence is meritless, as the court in *Eggleston* specifically held that the

"gathering and preservation of evidence is a police function, necessary for the safety and welfare of society." *Eggleston*, 148 Wn.2d at 769. The fundamental purpose in executing the search warrant on Mr. Brutsche's property was to gather evidence of serious criminal conduct, specifically the suspected illegal manufacture of methamphetamines.

The court's holding and analysis in *Eggleston* directly negates Brutsche's claim that he is somehow entitled to compensation because the police went "too far" in damaging his various doors and door jambs. The court in *Eggleston* specifically cited and adopted the analysis set forth in *Kelley v. Story Co. Sheriff*, 611 N.W.2d 475, 477 (Iowa 2000), in which the Supreme Court of Iowa held that damage to the front doors of plaintiff's residence caused by law enforcement officers executing a warrant resulted from the valid exercise of police power and was not a compensable taking pursuant to eminent domain. Significantly, the court in *Kelley* upheld a summary judgment dismissal of plaintiff's claim for compensation based on facts virtually identical to the case at bar. The court succinctly defined eminent domain as "the taking of private property for a public use for which compensation must be given." Conversely, the court stated that police power "controls and regulates the use of property for the public good for which no compensation need be made." 611 N.W.2d at 479. The court concluded:

> . . . the county's right to provide for the safety and welfare of its citizens in enforcing the state's criminal laws and procedures outweighs any interference or economic impact of the officer's action on plaintiff's property as presented in this case. The damage caused to plaintiff's property in this case would seem to be more in line with those cases where property owners have been forced to bear some burden for the public good, but where no taking of private property was found.

6 *Kelley*, 611 N.W.2d at 481.

Both *Eggleston* and *Kelley* are directly on point, and negate any claim by Brutsche that he is entitled to compensation for any property damage he sustained in connection with the execution of the search warrant in this case. Furthermore, the analysis set forth in *Eggleston* and *Kelley* applies equally to the takings clause of the Fifth Amendment to the U.S. Constitution. *See Hurtado v. U.S.*, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed. 2d 508 (1973). Thus, Brutsche's attempt to premise his takings claim on federal constitutional law is also without merit.

The trial court properly rejected Brutsche's attempt to invoke the doctrine of eminent domain as inapplicable to the case facts. The Special Response Team's actions had nothing to do with eminent domain, but rather were undertaken pursuant to the State's police power. As a result, no compensable taking occurred.

C. THE TRIAL COURT CORRECTLY CONCLUDED THAT POLICE ACTIONS WHEN EXECUTING A SEARCH WARRANT ARE NOT SUBJECT TO A NEGLIGENCE STANDARD.

1. No Cause of Action Exists for Negligent Infliction of Property Damage During the Execution of a Search Warrant.

The threshold determination in any negligence suit is whether a duty of care is owed by the defendant to the plaintiff. Absent such a duty, no cause of action for negligence exists. *Keates v. Vancouver*, 73 Wn. App. 257, 265, 869 P.2d 88 (1994). It is well established that, under traditional negligence principles, whether a particular class of defendants owes a duty to a particular class of plaintiffs presents a question of law that is dependent on mixed considerations of "logic, common sense, justice, policy, and precedent." *Keates*, 73 Wn. App. at 265, quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974).

In *Keates*, the court held that police officers do not owe any duty to use reasonable care to avoid inadvertent infliction of emotional distress on criminal investigation subjects. Keates, who was a suspect in his wife's murder, sought damages against the police on the basis of outrage and negligent infliction of emotional distress. In affirming the dismissal of Keates' lawsuit, the court noted that it is in society's best interest that criminals be promptly apprehended and punished, and concluded:

> Because the utility of the law enforcement function outweighs the criminal suspect's interest in freedom from emotional distress, "[t]he law ... closely circumscribes the types of causes of action which may arise against those who participate in law enforcement activity". . . As a general rule, law enforcement activities are not reachable in negligence.

73 Wn. App. at 267 (citations omitted).

The court further noted that Washington State "recognizes the central roles which police and prosecutors play in maintaining order in our society and the burdens imposed on each of us as citizens as part of the price for that order." *Keates*, 73 Wn. App. at 268, quoting *Hanson v. Snohomish*, 121 Wn.2d 552, 568, 852 P.2d 295 (1993). Citing Washington's recognition that lawsuits against police officers tend to obstruct justice, the court held that allowing a cause of action for negligent infliction of emotional distress "would have a chilling effect on police investigation and would give rise to potentially unlimited liability for any type of police activity." *Keates*, 73 Wn. App. at 269. *See also, Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991), where the court, on virtually identical policy grounds, held that no cause of action for negligent governmental investigation exists in this state.

The above-quoted policy considerations are directly applicable to the case at bar, and negate any claim by Brutsche that the police officers

involved owed a duty to avoid negligent, incidental damage to his property while in the process of executing a facially valid search warrant.

Brutsche remains unable to cite any authority to support his claim that a negligence standard applies to police conduct when executing a search warrant. Both *Mathis v. Ammons,* 84 Wn. App. 411, 928 P.2d 431 (1996), and *Callan v. O'Neil,* 20 Wn. App. 32, 578 P.2d 890 (1978), cited on p. 16 of Appellant's Brief, arose out of automobile accidents involving private parties. After citing irrelevant case law, and announcing a lack of "legislative proscriptions," Brutsche makes the bald assertion that "the default standard of care would be ordinary care." (See Brief of Appellant, p. 16). Brutsche's claim is without merit, and is directly refuted by the *Keates*, *Hanson* and *Dever* cases discussed above.

It is undisputed that the police had probable cause to believe that criminal activity was taking place on Brutsche's property. It would unquestionably impair vigorous prosecution of criminals, and have a chilling effect on law enforcement, if police who execute search warrants were subject to civil liability for reasonably necessary damage caused to someone's property in the process of executing their duties. When weighing the interest of society in eradicating criminal drug activity, versus Mr. Brutsche's interest in avoiding incidental physical damage to

his property, governing Washington case law mandates that society's interest in this context must prevail.

Based on the foregoing, the trial court properly rejected Brutsche's negligence claim.

2. The Abolition of Sovereign Immunity Did Not Create Any New Causes of Action In Tort Against Municipalities.

The Washington State Legislature's 1967 abolition of sovereign immunity for municipal corporations did not create any new duties or causes of action against cities. RCW 4.96.010 declared that municipal corporations "shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers ... to the same extent as if they were a private person or corporation . . ." However, as the court specifically stated in *Garnett v. Bellevue*, 59 Wn. App. 281, 796 P.2d 782:

> . . . RCW 4.96.010 does not create any new causes of action, imposes no new duties, and brings into being no new liability; it merely removes the defense of sovereign immunity, *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983), *overruled on other grounds* in *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988). The intent of RCW 4.96.010 was to permit a cause of action in tort *if a duty could be established*, just the same as with a private person. *J&B Dev. Co.*, 100 Wn.2d at 305. In sum, one must first establish the existence of a duty and then apply RCW 4.96.010 to insure that, having established the duty, claimants may proceed in tort against municipalities to the same extent as if the municipality were a private person.

59 Wn. App. at 285.

Contrary to Brutsche's claims, *Bender v. Seattle* and *Employco Personnel Services v. Seattle,* cited and discussed on pp. 23-24 of Appellant's Brief, do not create a negligence cause of action against the City in this case. The trial court properly concluded that the police officers executing this search warrant owed no duty of ordinary care to Mr. Brutsche to avoid the incidental damage to his property that occurred.

In *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), the Washington Supreme Court held that discretionary governmental immunity (a court created exception to the general rule of governmental tort liability) did not apply to the operational decisions of police officers, prosecutors and their employers in the context of criminal investigations and the filing of criminal charges. While the court in *Bender* limited the scope of the discretionary act exception, it did not create any new cause of action in negligence against either the police or against the municipalities that employ them. This point was clearly articulated in *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991). In *Dever*, the plaintiff brought suit against the City of Seattle, the Seattle Fire Department and its investigator after arson charges were brought against him and then later dismissed. The Division One Court of Appeals affirmed the trial court's summary dismissal of *Dever*'s negligent investigation claim. While *Dever* had argued that the holding in *Bender* created a cause of action for

negligent investigation, the appellate court dismissed this claim as "meritless," and noted that *Dever* failed to identify any particular duty owed by defendants to him. *Dever*, 63 Wn. App. at 45-46.

Mr. Brutsche's reliance on *Employco Personnel Services, Inc. v. Seattle*, 117 Wn.2d 606, 817 P.2d 1373 (1991) as a basis for asserting a negligence claim against the City is equally without merit. In *Employco,* the Washington Supreme Court held that the City of Seattle was not immune from liability for the negligence of municipal workers who failed to identify the location of an underground electrical line, cut it and caused a power outage. The duty of a city worker to avoid cutting a power line has absolutely nothing to do with a police search pursuant to a valid warrant. *Employco* is readily distinguishable, and underscores the fact that a negligence analysis is inapplicable to Mr. Brutsche's case.

3. The Public Duty Doctrine Also Precludes Liability in this Case.

Mr. Brutsche improperly relies on *Bender v. Seattle* and *Employco Personnel v. Seattle, supra,* for the illogical assertion that the public duty doctrine does not apply in this case because Brutsche's claimed injury involved his "private property rights" and/or a "private duty." (*See* pp. 23-24 of Appellant's Brief).

It is important to distinguish situations in which the court has, on policy grounds, held that the police owed no duty of care, to situations where the police are not liable under the public duty doctrine because the duty owed is to the public at large versus an individual plaintiff. In cases such as *Dever* and *Keates, supra*, the court ruled that no duty of care, the basis for any negligence claim, existed against police involved in criminal investigations. The analysis in those cases applies directly to the case at bar, since a search warrant is a necessary tool used by the police to investigate suspected criminal activity, and is an integral part of criminal investigations. Since the police owed no duty of care to Mr. Brutsche in this context, no cause of action in negligence exists.

In this case the primary duty owed by the police was a duty to protect public safety, and to arrest those engaged in criminal conduct that threatened that safety. This constitutes a public duty of the highest order, and a primary purpose that police exist in any community. To recover against a municipal corporation in tort, a plaintiff has the burden of establishing that the duty breached was owed to the injured person individually, and was not merely the breach of a duty owed to the public in general (i.e., a duty to all is a duty to no one). *Meany v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). While there are limited exceptions to

the public duty doctrine (*see, e.g., Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988)), none of them applies in this case.

Thus, if this case is viewed from a public duty perspective, the public duty doctrine further precludes any negligence claim by Mr. Brutsche against the City of Kent. Even if he could establish that the Special Response Team breached its duty of care when executing this search warrant, this would not provide him with any cause of action because the only duty owed was to the public at large, not Leo Brutsche individually. Mr. Brutsche's assertion that the public duty doctrine does not apply because his claimed injury involved his "private property rights," and/or a "private duty", is simply without merit.

D. THE TRIAL COURT PROPERLY REJECTED BRUTSCHE'S ATTEMPT TO APPLY TRESPASS LAW TO THE EXECUTION OF A VALID SEARCH WARRANT.

Mr. Brutsche cites *Bradley v. American Smelting*, 104 Wn.2d 677, 709 P.2d 782 (1985) (*see* Appellant's Brief, p. 25) for his assertion that he proved a prima facie case for trespass in connection with the execution of this search warrant. In *Bradley*, landowners sought damages under theories of trespass and nuisance based on the deposit of microscopic metallic particles coming from defendant's smelter smoke stack. *Bradley* has no relevance whatsoever to legitimate police conduct in executing a facially valid search warrant. In granting the City's summary judgment

motion, the trial court correctly concluded that there could be no trespass in this instance because the search warrant judicially authorized the police to enter Brutsche's property.

Mr. Brutsche further claims that he is "not claiming damages from the mere entry [on his property], but for the destruction to his doors and door jams [sic] during the trespass." Brief of Appellant, p. 25. Brutsche quotes Restatement (Second) of Torts, §214(2), which provides that one who enters land with a privilege to do so is still subject to liability for a tortious act committed while on the property. (*See* Appellant's Brief, pp. 25-26). Significantly, Brutsche does not cite a single case applying §214(2) to police who are executing a search warrant. In essence, Mr. Brutsche's citation to §214(2) represents another attempt to assert a negligence argument under the guise of trespass law. However, as the trial court properly concluded, neither trespass nor negligence principles apply to the City in connection with the execution of this search warrant on Mr. Brutsche's property.

E. RCW 10.93 AUTHORIZED THE POLICE TO EXECUTE THIS SEARCH WARRANT REGARDLESS OF THE EXISTENCE OF ANY INTERLOCAL AGREEMENT.

Mr. Brutsche's claim that the Special Response Team did not have legal authority to execute the subject search warrant is without merit, and was properly rejected by the trial court. RCW 10.93, the Washington

Mutual Aid Peace Officers Powers Act (Mutual Aid Act), specifically authorized the police officers from cities other than Kent to assist the Kent police in executing this warrant. The legislature enacted the Mutual Aid Act in 1985 to modify traditional common law restraints on law enforcement authority, which restricted the geographical jurisdiction of peace officers. *State v. Plaggemeier*, 93 Wn. App. 472, 476, 969 P.2d 519 (1999); *State v. Rasmussen*, 70 Wn. App. 853, 855, 855 P.2d 1206 (1993). The Legislature clearly expressed its intent to remove such artificial barriers among law enforcement agencies. RCW 10.93.001(2) provides:

> It is the intent of the legislature that current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state and federal agencies be modified pursuant to this chapter.

The Legislature further mandated that the Mutual Aid Act "shall be liberally construed" to effectuate the above intent. RCW 10.93.001(3). To achieve its purpose, the statute sets forth specific circumstances under which a peace officer may enforce criminal and traffic laws outside of the officer's specific jurisdiction. See, RCW 10.93.070(1)-(6). Pursuant to RCW 10.93.070(3), any police officer in Washington is empowered to enforce criminal laws throughout the state in response to the request of a peace officer who has enforcement authority:

General authority peace officer – Powers of, circumstances

In addition to any other powers vested by law, a general authority Washington peace officer . . . may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

* * *

(3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority; (Emphasis added)

As previously described, the Special Response Team consisted of specially trained police officers from Kent as well as several other South King County jurisdictions. There is no question that the Kent police had enforcement authority to execute a warrant on property located in Kent. The SRT officers were called to assist the Kent police because of their particular expertise in executing high risk warrants involving criminal drug activity. Under these circumstances, RCW 10.93.070(3) directly empowered the Special Response Team to execute this search warrant.

The case at bar is readily distinguishable from *State v. Bartholomew*, 56 Wn. App. 617, 784 P.2d 1276 (1990), discussed on pages 39-40 of Appellant's Brief. In *Bartholomew*, Seattle police officers were investigating a robbery. Based on an anonymous tip, they "tagged

along" with Tacoma police officers who were executing a search warrant on a Tacoma residence and an arrest warrant for the woman who lived there (Cheylene Bartholomew). The Seattle police, who had no warrant of their own, arrested Ms. Bartholomew's ex-husband at the Tacoma residence and seized evidence relating to the Seattle robbery. The Division I Court of Appeals ruled that RCW 10.93.070(3) did not authorize the Seattle police officers to accompany the Tacoma police:

> The undisputed facts show that the Seattle police officers were not present "[i]n response to a request for assistance" by the Tacoma police. RCW 10.93.070(3). There is no indication that the Tacoma police needed assistance in the execution of their routine search warrant.
>
> * * *
>
> This is not a case where one law enforcement agency is executing a warrant and desires the expertise of officers from another agency. It is not a case where, for example, officers in a small rural community are executing a search warrant on a drug manufacturing operation, and request assistance from officers of the Drug Enforcement Administration who have experience identifying and confiscating drugs and drug paraphernalia.

56 Wn. App. at 621.

The court's analysis in *Bartholomew* underscores the applicability of RCW 10.93.070(3) to Mr. Brutsche's case. In *Bartholomew* the Tacoma police did not need any assistance from the Seattle police, as they were simply executing a routine search warrant. In the case at bar the

Kent Police specifically needed the expertise of the Special Response Team to execute a search warrant on a suspected methamphetamine lab. As indicated by the court in *Bartholomew*, RCW 10.93.070(3) is directly applicable to the very situation presented in this case.

In light of the above, Mr. Brutsche's assertion that the Special Response Team acted without legal authority is without merit. Furthermore, despite Brutsche's claims to the contrary, the fact that the interlocal agreement setting up the Special Response Team may not have been signed or ratified prior to execution of this search warrant is irrelevant. (See Appellant's Brief, pp. 36-39.) This is evidenced by *State v. Plaggemeier*, *supra*, the very case cited by Mr. Brutsche in support of his position.

In *Plaggemeier*, the court specifically rejected defendant's claim that a city police officer who arrested him outside of city limits lacked legal authority for the arrest because an interlocal agreement among five law enforcement agencies had not been ratified or filed as required by RCW 39.34. The court noted that RCW 10.93 authorizes extra jurisdictional enforcement action in six circumstances, and that a mutual law enforcement assistance agreement constitutes only one of those circumstances. In *Plaggemeier*, the arrest was authorized by the consent provision set forth in RCW 10.93.070(1). In this case, as explained above,

the actions of the Special Response Team were specifically authorized by RCW 10.93.070(3). In both cases, the existence of an interlocal agreement was irrelevant because the actions of the police officers were specifically authorized by RCW 10.93.

F. THE DELEGATION DOCTRINE HAS NO BEARING ON THE EXERCISE OF EXTRA JURISDICTIONAL LAW ENFORCEMENT PURSUANT TO RCW 10.93.

In *State v. Plaggemeier*, *supra,* the court noted that its holding that the consent provision contained in the interlocal agreement was severable "does not violate the delegation doctrine as the consent agreement is not concerned with the allocation of fiscal resources, but rather with extra jurisdictional arrests." *Plaggemeier*, 93 Wn. App. at 483. The delegation doctrine is equally inapplicable to the other statutory grounds for extra jurisdictional law enforcement set forth in RCW 10.93.070. RCW 10.93.070(3), which authorized the Special Response Team to assist with the execution of this search warrant, is completely unrelated to the allocation of fiscal resources. Rather, it relates directly to extra jurisdictional enforcement of traffic and criminal laws. For this reason, Brutsche's assertion that the Special Response Team's execution of this search warrant violated the delegation doctrine (see Brief of Appellant, pp. 40, 42) is meritless, and was properly rejected by the trial court.

G. THE TRIAL COURT'S DISMISSAL OF BRUTSCHE'S LAWSUIT HAD NOTHING TO DO WITH QUALIFIED OR CONDITIONAL IMMUNITY.

The City's summary judgment motion was never premised on any type of qualified or conditional immunity argument, nor did the trial court grant the City's motion on that basis. Contrary to Brutsche's assertions, the City at no time sought to "avail itself of any qualified immunity that might be available to its officers." (See Brief of Appellant, p. 27). Any such immunity argument would be irrelevant in the context of this suit, since there was no basis for imposing liability against the City in the first place. For this reason, Mr. Brutsche's repeated references to qualified and/or conditional immunity (see Brief of Appellant, pp. 26-27, 36, 40-44) simply have no bearing on the liability analysis in this case.

H. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING LESS THAN 15% OF THE ATTORNEY FEES THE CITY WAS ENTITLED TO PURSUANT TO MAR 7.3.

1. MAR 7.3 Mandated an Award of the City's Costs and Reasonable Attorney Fees Because Brutsche Failed to Improve His Position on the Trial De Novo.

Mandatory Arbitration Rule 7.3 provides as follows:

> **RULE 7.3. Costs and attorney fees.**
>
> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo.

> "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule. (emphasis added)

The purpose of MAR 7.3 is "to discourage meritless appeals and to thereby reduce court congestion." *Puget Sound Bank v. Richardson*, 54 Wn. App. 295, 298, 773 P.2d 429 (1989). In *Richardson*, the court specifically held that a summary judgment proceeding constitutes a trial de novo for purposes of MAR 7.3. Furthermore, pursuant to that rule, an award of costs and attorney fees is *required* against a party who appeals an arbitration award and fails to improve his position on the trial de novo.

In *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005), the court noted that MAR 7.3 "uses both a stick and a carrot" approach to accomplishing the dual goal of discouraging meritless appeals and reducing court congestion:

> First, the rule threatens mandatory attorney fees for any party who requests a trial de novo but does not improve its position. Next, it offers the party an incentive to withdraw its request, with the possibility of avoiding attorney fees at the discretion of the court. Both the stick and the carrot are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion.

127 Wn. App. at 187.

The court in *Do* noted that the award of costs and reasonable attorney fees was mandatory in *Richardson, supra*, where the defendant

lost at arbitration, requested a trial de novo, and then lost on summary judgment prior to trial. The assessment of costs and attorney fees was equally mandatory in this instance, where Mr. Brutsche obtained a nominal award at arbitration, and subsequently lost on summary judgment after requesting a trial de novo.

2. Counsel for the City Provided Ample Documentation for the Trial Court to Award Reasonable Attorney Fees Pursuant to the Lodestar Method.

In awarding damages, the courts in this state are guided by the lodestar method. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). Basically, the method consists of determining the reasonable number of hours of attorney time spent in securing a successful recovery for the client, and multiplying that number by what is determined to be a reasonable hourly rate for the attorney time spent. *Mahler*, 135 Wn.2d at 434. The Supreme Court in *Mahler* further held that findings of fact and conclusions of law are required to establish an adequate record on review to support a fee award. *Mahler*, 135 Wn.2d at 435.

The court in *Mahler* also addressed the degree of specificity needed with regard to describing the attorney time spent in representing a client in a given case. While counsel is required to provide contemporaneous records documenting the hours worked, such documentation:

> 'need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).

135 Wn.2d at 434, quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

The court in *Bowers* suggested a "simple table illustrating the calculation of a lodestar," itemizing the attorney and type of work performed, the hours spent, the hourly rate, a subtotal for each general area of work performed, and a grand total.

In support of its motion for attorney fees, counsel for the City submitted two detailed declarations that fully satisfied the requirements of *Bowers* and *Mahler, supra,* and established that reasonable attorney fees in this case, generated from the date that Mr. Brutsche filed his request for trial de novo through July 22, 2005, the date that the court granted the City's summary judgment motion, totaled $27,124.00. CP 255-262; CP 284-285. As anticipated, Mr. Brutsche's attorney argued that the fees in this case were unreasonable because of the relatively small monetary amount at issue. However, the Washington Supreme Court has made it very clear that the amount at stake in a given case is not a conclusive factor in determining what constitutes a reasonable attorney fee award. In *Mahler, supra*, the Court specifically stated:

> Mahler asks us to sustain the trial court's fee award. State Farm contends the fee award below was unreasonable in light of the small amount at stake in this case.
>
> At the outset, we note that the amount of the recovery, while a relevant consideration in determining the reasonableness of the fee award, is not a conclusive factor. *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993). We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.

113 Wn.2d, at 433.

As reflected in the declarations of counsel submitted on behalf of the City, Brutsche raised a myriad number of legal issues and arguments in this case that required significant research to adequately rebut. Brutsche misapplied and/or merged numerous legal doctrines in an attempt to defeat the City's motion. The plethora of legal issues and claims asserted by Brutsche's attorney, and his novel arguments and analysis, necessitated the attorney time spent by defense counsel to counter Brutsche's claims and successfully defend this case. Examples of this included citations to numerous land use cases in an attempt to apply eminent domain law to the exercise of police power during execution of a search warrant, Brutsche's argument regarding substantive due process, his argument that the "public duty doctrine" did not apply because Brutsche's right to be free from property damage was a "private" right

under trespass law, the assertion of the "delegation doctrine," the claim that the execution of this warrant was not authorized because an interlocal cooperative agreement had not been signed or ratified when the search took place, a claim that the City was strictly liable for damages arising out of use of the "swat team," a claimed issue regarding qualified immunity and waiver of this immunity by the City, Brutsche's attempt to apply the rational basis test (which is applicable to the equal protection clause of the Fourteenth Amendment) to his alleged substantive due process claim, and Brutsche's numerous citations to both Washington and out-of-state cases that simply did not apply to the facts at issue in this case. Under these circumstances, Mr. Brutsche was in no position to complain about the attorney time spent defending this lawsuit.

Furthermore, the legal issues raised by Mr. Brutsche had much broader implications than the $5,000 in property damage asserted by him in his amended complaint. These issues included the authority of the police to execute a criminal search warrant, and the scope of permissible police conduct when executing such warrants. The broad implications of these issues for the City of Kent and other municipalities justified the attorney time spent in successfully defending this matter. In addition, Brutsche's complaint sought additional damages, including punitive damages and attorney fees to 42 USC §1983.

As explained to the trial court in connection with the City's motion for reconsideration, the City's requested attorney fees were not solely attributable to the preparation of its successful summary judgment motion. In addition, the City's attorneys were responding to Brutsche's numerous discovery requests, and preparing for an upcoming trial date. CP 299, 300; CP 259-261. As the City also pointed out (CP 300), it has the right to defend a case on principle, rather than follow a policy of settling nuisance value, groundless lawsuits to avoid the expense of a defense.

In light of the above, the trial court's award of less than 15% of the City's attorneys fees constituted a manifest abuse of discretion, and violated MAR 7.3's mandate that reasonable attorney fees be awarded.

I. THE TRIAL COURT'S FEE AWARD SHOULD BE REMANDED BECAUSE THERE ARE NO FINDINGS TO SUPPORT THE COURT'S AWARD.

As noted in *Mahler v. Szucs, supra*, "Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wn.2d at 435. In *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P. 2d 1015 (1993), one of the cases cited by *Mahler*, the Division I Court of Appeals stressed that, when a trial court makes a fee award, "the basis for and calculation of that award should be supported by appropriate findings and conclusions." *Bentzen*,

68 Wn. App. at 351. Pursuant to *Mahler*, findings of fact and conclusions of law are specifically required to establish such a record. *Mahler*, 135 Wn.2d at 435. When no such record exists, the appropriate remedy is to vacate the award and remand for reconsideration. *Smith v. Dalton*, 58 Wn. App. 876, 885, 79 P.2d 706 (1990).

In its September 16, 2005 Findings of Fact, Conclusions or Law and Order Awarding Attorney Fees to the City, the trial court specifically acknowledged that, pursuant to MAR 7.3, the City was entitled to recover its costs and reasonable attorney fees incurred after April 19, 2005, the date that Mr. Brutsche filed his request for a trial de novo. CP 294, 295. The court further acknowledged that the declaration of counsel, filed in support of the City's motion for attorney fees, described the fees incurred by the City in sufficient detail to comply with the requirements set forth in *Mahler v. Szucs* and *Bowers v. Transamerica Title Insurance Company, supra*. CP 295. However, the court provided no explanation whatsoever, for its decision to award only $4,050 of the $27,124 in fees incurred by the City. The court's findings and conclusions are completely silent as to the basis for the court's award, or the rationale underlying the court's apparent conclusion that awarding less than 15% of the City's fees was reasonable.

In its motion for reconsideration of the attorney fees awarded, counsel for the City specifically requested that the court allow oral

argument regarding its motion. CP 297. Even if the court was not inclined to award the full amount of fees incurred, the City requested that "a revised amount, with an explanation by the Court of the reasoning for the amount awarded . . ." be ordered. CP 302. The trial court refused to acknowledge the City's request for oral argument, which would have created some record regarding the basis for the court's ruling, and further refused to provide any explanation for its arbitrary denial of the City's motion to amend the attorney fees award. CP 321.

J. ATTORNEY FEES ON APPEAL.

1. Brutsche's request for attorney fees on appeal should be denied.

Brutsche's claim that he is entitled to attorney fees pursuant to 42 U.S.C. § 1988(b) is meritless. As acknowledged in Mr. Brutsche's appellate brief (page 45), pursuant to § 1988(b) a court may, in its discretion, award reasonable attorney fees to the prevailing party in an action premises on 42 U.S.C. § 1983. Brutsche did not even argue any violation of 42 U.S.C. § 1983 on appeal, a claim that the trial court summarily dismissed in granting the City's summary judgment motion.

In this case, Mr. Brutsche sued only the City of Kent, not any of the individual police officers involved in executing the subject search warrant. Mr. Brutsche had no grounds for asserting a § 1983 claim

because he sustained no constitutional deprivation resulting from any City policy or custom. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Brutsche's § 1983 claim against the City failed on several grounds. First, Brutsche was attempting to hold the City liable under a theory of respondeat superior, which is insufficient to establish municipal liability under § 1983. *Monell, supra.* In addition, the allegation of a single incident, as in this case, is insufficient to impose municipal liability under § 1983 unless the incident was "caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policy maker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 824, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). Mr. Brutsche made no claim that there was any type of existing, unconstitutional policy which caused any alleged constitutional deprivation, nor was there any evidence to support such a claim.

The trial court properly concluded that Brutsche's § 1983 claim was without merit and dismissed it as a matter of law. Since Brutsche cannot establish any claim premised on § 1983, he has no basis for recovering attorney fees pursuant to 42 U.S.C. § 1988(b).

2. The City should be awarded its attorney fees on appeal.

In *Arment v. Kmart Corporation*, 79 Wn. App. 694, the Division I Court of Appeals stated:

> A party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve her position.

79 Wn. App. at 700.

In *Arment*, the trial court awarded defendant Kmart's attorney fees under MAR 7.3, because Arment appealed an arbitration award and failed to improve her position on appeal. Kmart requested attorney fees on appeal, and the court responded as follows:

> Because we affirm the grant of summary judgment, we also grant Kmart's request for attorney fees on appeal.

79 Wn. App. at 700.

The City hereby requests that the Court award its attorney fees on appeal. As in *Arment*, the City's request should be granted in conjunction with the Court's affirmance of the trial court's summary judgment dismissal of Brutsche's lawsuit against the City.

CONCLUSION

The search warrant in this case was obtained based on probable cause to believe that Leo Brutsche's son, who resided in a mobile home on his property, was involved in the illegal manufacture of methamphetamines. Mr. Brutsche can assert no viable legal basis to support his claim that the City of Kent should be liable for the physical damage to various doors and door jambs caused by the Special Response

Team during the execution of this search warrant. The trial court's dismissal of Brutsche's suit against the City was proper, and the July 22, 2005 order granting the City's motion for summary judgment of dismissal should be affirmed.

Conversely, the trial court's award of less than 15% of the City's attorney fees, incurred after Brutsche filed his request for a trial de novo, violated MAR 7.3's requirement that reasonable attorney fees be awarded and constituted an abuse of discretion. In any event, given the court's refusal to create any record in support of its fee award, the City respectfully requests that the award be vacated and remanded for reconsideration.

Finally, while Mr. Brutsche's request for attorney fees on appeal is without basis, the City's request for attorney fees on appeal should be granted in conjunction with the court's affirmance of the trial court's summary judgment dismissal of Brutsche's suit against the City.

Respectfully submitted this 9th day of January, 2006.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

Chloethiel W. DeWeese

Chloethiel W. DeWeese, WSBA #9243
Richard B. Jolley, WSBA #23472
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I certify that I served a copy of *Brief of Respondent/Cross-Appellant* upon all parties of record on the 9th day of January, 2006, via United States Postal Service as follows:

Jerald A. Klein
Attorney at Law
823 Joshua Green Blg.
1425 Fourth Ave.
Seattle, WA 98101-2236

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Karla L. Struck

U:\BEberhardt\rbj\wcia04091\p-121905-ct app brief respon- x-app.doc

APPENDIX

KING COUNTY DISTRICT COURT
AUKEEN DIVISION

STATE OF WASHINGTON)
:ss
COUNTY OF KING)

No. RJC011853

SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

Upon the sworn complaint made before me, there is probable cause to believe that the crime(s) of have been committed and that the evidence of that crime or contraband, the fruits of crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained is/are concealed in or on certain premises, vehicles, or persons.

YOU ARE COMMANDED TO:

1. Search within 3 days of this date, the premises, vehicle, or person described as follows:

   - An old abandoned, non-operational manufacturing warehouse with an unknown number of office units inside, and several open outbuildings, about eight semi trailers and a white and pink mobile home located at the address of 426 Naden Ave, Kent, County of King, State of Washington
   - Numerous abandoned or disabled vehicles parked within the fenced compound of the previously stated warehouse/residence.
   - Any locked containers: such as filing cabinets, safes, and storage containers at the previously stated warehouse/residence (See attached photograph incorporated by reference appendix "A" for further description)
   - And person of James F. Brutsche, white male, born on 06/26/1958, 5'-11" tall, and about 160 with brown hair and brown eyes

2. Seize, if located, the following property or person(s):

- Any controlled substances including but not limited to; METHAMPHETAMINE,
- Paraphernalia and equipment used for producing, packaging, processing, possessing, weighing and distributing controlled substances, to-wit; Methaphetamine,scales, funnels, sifters, grinders, containers, plastic bags, ephedrine, lithium batteries, anhydrous ammonia or materials used to contain controlled substances, heat-sealing devices, dilutants, other chemicals, and the like;

KING COUNTY DISTRICT COURT
RENTON DIVISION

- Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;
- Personal books, letters, papers, notes, pictures, or documents relating names, addresses, telephone numbers, and/or other contact/ identification information relating to the possession, processing, or distribution of controlled substances;
- Cash, US currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;
- Items of personal property which tend to identify the person(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys;
- Airline tickets, notes and itineraries, airline schedules, bills, charge card receipts, hotel/motel/rent-a-car statements, correspondence with travel agencies and other travel-related businesses, airline/rent-a-car/hotel/frequent flier cards and statements, passports and other papers relating to domestic and international travel;
- Electronic storage devices to include computers, fax machines, answering machines, storage disks, etc...
- Firearms and ammunition;
- Fruits of criminal enterprise, or property held or acquired in violation of RCW 69.50.505.

3. Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person if found in possession, a copy and receipt shall be conspicuously posted at the place where the property if found.

KING COUNTY DISTRICT COURT
RENTON DIVISION

Date/Time:
7/8/03 . 4:15 p.m.

JUDGE: Linda G. Thompson

[ ] This warrant was issued by the above judge, pursuant to the telephonic warrant procedure authorized by JCrR 2.10 and CrR 2.3, on , at

---

DAVID L. MCKENZIE
VNET #05185

Printed or Typed Name of Peace Officer Agency, and Personnel Number

Signature of Peace Officer Authorized to Affix Judge's Signature to Warrant

Copies: Judge (Original)
Court
Police File
Copy for Premises Searched

JUDGE BRIAN D. GAIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO C. BRUTSCHE,

Plaintiff,

v.

CITY OF KENT, A Washington municipal corporation, king county, a political subdivision of the State of Washington

Defendant.

No. 04-2-12087-0KNT

DECLARATION OF DARREN MAJACK OF THE KENT POLICE DEPARTMENT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Darren Majack, hereby declare:

1. I am a patrol officer with the City of Kent Police Department. In July of 2003, I also served as a member of the Valley Special Response Team (SRT).

2. The SRT is a multi-jurisdictional entity with members from a variety of South King County law enforcement jurisdictions. The SRT performs functions the public would commonly associate with a SWAT team.

3. Because the SRT is trained for and equipped to handle special situations, it is utilized to perform tasks that regular patrol officers are either unequipped or not trained to do. Examples include serving high risk warrants, dealing with barricaded subjects, and addressing hostage situations. The SRT trains regularly so that tactics necessary to assure mission accomplishment and promote officer safety become simply a matter of response. Through repetition of standard operating procedure, SRT members are trained to react and rely on their training during stressful and potentially dangerous situations.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

4. On July 10, 2003, the SRT was employed to execute a search warrant on Leo Brutsche's property at 426 Naden Avenue in the City of Kent. Execution of this particular search warrant was not appropriate for regular police officers as both the logistics and the subject matter of the warrant created a high risk situation. The warrant service was high risk because it involved a search for the manufacture of methamphetamines and the apprehension of subjects in the methamphetamine trade. Based on my training and experience, persons involved in the methamphetamine trade are typically paranoid, irrational and are often armed to protect themselves from other criminals.

5. The location for the service of this warrant also contributed to assessment of the warrant execution as high risk. The property was large in area and contained a number of structures including permanent buildings, trailers and junk vehicles. Each building on the property presented an opportunity for unaccounted for subjects to utilize that structure for cover and concealment should they wish to engage police in a gun battle.

6. When the SRT arrived in fully marked police vehicles, and with police officers wearing fully marked police uniforms, James Brutsche (the subject of the warrant), immediately provided resistance. Upon seeing the police vehicles arrive, Brutsche bolted from an outdoor area near one of the structures to the interior of the mobile home on the premises. He ran from the police despite an announcement, repeated three times over the loud speaker from one of the vehicles, that the police had arrived and had a search warrant for 426 Naden Avenue. Once inside, Brutsche attempted to barricade himself and another suspect in the structure by placing a broomstick or dowel in a sliding glass door to prevent police entry.

7. Brutsche was pursued into the mobile home, and the sliding glass door of the trailer was breached almost immediately by the SRT. This tactic was necessary for two reasons. First, because the SRT did not know if Brutsche was inside arming himself, or rallying unaccounted for subjects inside to arm themselves and engage the police in a fight, being outside the mobile home while Brutsche and possibly others were inside severely

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

compromised police safety. Officer safety concerns were heightened due to the glare; anyone inside the mobile home could see the SRT but team members could not see into the structure to respond to any potential offensive actions taken against them.

8. Additionally, since the purpose of the search warrant was to obtain evidence of illegal methamphetamine manufacture, it was necessary to breach the door to minimize the likelihood that evidence was being destroyed while the police were held at bay.

9. Once the glass door was breached, the subject inside remained hostile and non-complaint. Because James Brutsche was combative and resistive, it was necessary to use a taser against him so that he could be taken into custody.

10. Given the resistance and non-compliance offered by Brutsche, it was reasonable to conclude that other buildings or structures on the property could house other potentially dangerous and non-complaint subjects. Accordingly, it was necessary to gain access to each of these buildings as quickly as possible to minimize officer safety concerns. Some of the buildings were not locked. Accordingly, officers simply opened the doors and secured the buildings. On other structures, because the doors were locked, officers used breaching devices to gain entry.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 20 day of June, 2005 at Seattle, Washington.

DARREN MAJACK

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

JUDGE BRIAN D. GAIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO C. BRUTSCHE,

Plaintiff,

v.

CITY OF KENT, A Washington municipal corporation, king county, a political subdivision of the State of Washington

Defendant.

No. 04-2-12087-0KNT

DECLARATION OF LIEUTENANT MIKE VILLA OF THE TUKWILA POLICE DEPARTMENT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Mike Villa, hereby declare:

1. I am a lieutenant with the Tukwila, Washington Police Department. In July of 2003, as part of my responsibilities as a Tukwila police officer, I served as commander of the Valley Special Response Team (SRT).

2. The SRT is a multi-jurisdictional entity with members from a variety of South King County law enforcement jurisdictions. Members of the SRT include police officers from Renton, Federal Way, Auburn, Kent, Tukwila and the Port of Seattle. The SRT performs functions the public would commonly associate with a SWAT team. The team is utilized to serve high risk warrants, address barricaded subjects, hostage situations and other circumstances that rank and file patrol officers are not trained in or equipped to address.

CP 46
App. 7

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

3. The SRT is used to executing high risk search warrants, such as warrants for dangerous fugitives or at methamphetamine lab sites, because those situations are known to be dangerous and volatile and pose a significant risk to officer safety.

4. On July 10, 2003, I was a member of the Special Response Team that executed a search warrant for the property at 426 Naden Avenue in Kent, WA. The Valley Narcotic Enforcement Team (known as VNET) obtained this warrant, and requested that the SRT execute the warrant because of its high risk nature and the SRT's specialized training.

5. Execution of this search warrant required use of the SRT because of the logistical layout of the property and the subject matter of the search warrant. The warrant was to search for the manufacture and distribution of methamphetamines. Due to the effects of this drug, and the known lifestyle of those involved in the methamphetamine trade, service of such warrants is a high risk endeavor. Methamphetamine users are typically paranoid, will act in an irrational fashion, and are often armed to protect themselves from other criminals.

6. The property at 426 Naden also presented a high risk scenario for officers because of the logistical layout. The compound at 426 Naden is quite large and contains a number of permanent and temporary structures. The number of structures is significant from an officer safety perspective, because those structures provide potential cover and concealment for anyone seeking to do the police harm. Likewise, the large space presents officer safety issues because it requires more time and officers to fully secure a large space before a safe search of the premises can be done.

7. Because VNET detectives had reported that the property owner allowed multiple suspected drug users to sleep/live throughout the property, the SRT planned to

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

search the primary residence (a mobile home) right away, while the perimeter team locked down the rest of the compound.

8. On July 10, 2003, as the SRT arrived in fully marked police vehicles and with officers in clearly marked police uniforms, the subject of the warrant, James Brutsche, immediately offered resistance to the police. As the vehicles arrived, an announcement was made three times over a vehicle loud speaker that the police had arrived to execute a search warrant at 426 Naden Avenue. In response, Mr. Brutsche bolted from an area outside of one of the compound structures and ran into the mobile home where he apparently resided. By spotting police officers and running away, Mr. Brutsche "compromised" the SRT at that moment.

9. A "compromise" occurs when the subjects of a warrant are aware that the police have arrived before the subjects and area to be searched have been secured. When a compromise occurs, officer safety concerns are heightened because unaccounted for subjects have the opportunity to arm themselves, flee, or destroy evidence before the area is secured.

10. As Brutsche ran into the mobile home, officers pursued him but discovered that he had attempted to barricade himself inside the structure to prevent the entry of the police. Because the police were outside, unable to see into the trailer due to the glare off of the glass, and because subjects inside the mobile home could easily see them, officer safety issues dictated that the door be breached immediately. A member of the SRT breached the door with some sort of breaching device and captured Mr. Brutsche inside the mobile home.

11. Given Mr. Burtsche's response to the arrival of the SRT, it was also imperative to breach the door and gain immediate access to the building to preclude any subjects inside from destroying evidence or arming themselves.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

12. After the police gained entry to the mobile home in which suspect Brutsche had barricaded himself, he violently resisted arrest by fighting with multiple officers on the glass-covered floor. The officers eventually had to taser Mr. Brutsche so that he could be taken into custody.

13. Once James Brutsche was taken into custody, it was necessary to immediately enter the other structures on the premises. Immediate entry was necessary because these other structures presented possible cover and concealment for unknown subjects. Given James Brutsche's resistive and uncooperative posture, it was reasonable to believe there may be other uncooperative and potentially dangerous subjects on the premises. Immediate access to the other structures was necessary not only to secure those buildings and make sure that no subjects posed threats to officer safety, but also to prevent possible destruction of evidence. The search warrant issued by the judge provided specific permission to enter all buildings on the property and gain access to locked containers.

14. To gain immediate access to these buildings, it was necessary to breach the doors of several of the structures. The doors of some structures were unlocked, and access was gained by simply opening the doors, but several structures were locked and breaching of the doors was necessary.

15. As the interior structures of the property were being secured, a secure perimeter was also set up. The purpose of setting up a perimeter was to prevent any unaccounted for subjects from escaping, as well as to preclude possible contamination of the integrity of the crime scene.

16. It is my understanding that the Plaintiff contends that he could have opened some of the locked doors while execution of the warrant was being conducted. While I never saw the Plaintiff at the scene while the search was going on, as the SRT commander I

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

would not have permitted him access to the property until the search was complete. As a matter of standard operating procedure, the SRT does not allow access in or out of a potential crime scene until a search has been completed. This procedure not only maintains the integrity of the potential crime scene, but also ensures the safety of innocent bystanders in a potentially high risk environment.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 15 day of June, 2005 at Seattle, Washington.

LIEUTENANT MIKE VILLA

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

CHAPTER 10.93

WASHINGTON MUTUAL AID PEACE OFFICERS POWERS ACT

Section

Library References

Fresh pursuit, statutory grounds for fresh pursuit, see Wash.Prac. vol. 12, Ferguson, § 3126.

Geographic limitations and jurisdiction, see Wash.Prac. vol. 12, Ferguson, § 3109.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

10.93.001. Short title—Legislative intent—Construction

(1) This chapter may be known and cited as the Washington mutual aid peace officer powers act of 1985.

(2) It is the intent of the legislature that current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies be modified pursuant to this chapter.

(3) This chapter shall be liberally construed to effectuate the intent of the legislature to modify current restrictions upon the limited territorial and enforcement authority of general authority peace officers and to effectuate mutual aid among agencies.

(4) T' modification of territorial and enforcement authority of the various categories of peace officers covered by this chapter

shall not create a duty to act in extraterritorial situations beyond any duty which may otherwise be imposed by law or which may be imposed by the primary commissioning agency.
[1985 c 89 § 1.]

Library References

Municipal Corporations ⇐188.
Sheriffs and Constables ⇐86.
WESTLAW Topic Nos. 268, 353.
C.J.S. Municipal Corporations §§ 486, 487.
C.J.S. Sheriffs and Constables §§ 66 to 79.

Notes of Decisions

1. Legislative intent

Intent of Washington Mutual Aid Peace Officers Powers Act was to modify geographic restrictions which had limited authority of Washington peace officers to act beyond their territorial restrictions and to effectuate mutual aid among local, state and federal agencies. Sheimo v. Bengston (1992) 64 Wash. App. 545, 825 P.2d 343.

2. Common law

Traditional common-law concepts governing rights and obligations of "loaned servant" or "borrowed servant" did not apply to dispute between county and city as to who was liable for allegedly negligent acts of county officers during police standoff; Washington Mutual Aid Peace Officers Powers Act applied. Sheimo v. Bengston (1992) 64 Wash.App. 545, 825 P.2d 343.

3. Construction with other laws

Legislature intended that agencies contracting for mutual law enforcement assistance must comply with the Interlocal Cooperation Act, and thus must obtain legislative ratification. State v. Plaggemeier (1999) 93 Wash.App. 472, 969 P.2d 519, review denied 137 Wash.2d 1036, 980 P.2d 1282.

10.93.020. Definitions

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

(1) "General authority Washington law enforcement agency" means any agency, department, or division of a municipal corporation, political subdivision, or other unit of local government of this state, and any agency, department, or division of state government, having as its primary function the detection and apprehension of persons committing infractions or violating the traffic or criminal laws in general, as distinguished from a limited authority Washington law enforcement agency, and any other unit of government expressly designated by statute as a general authority Washington law enforcement agency. The Washington state patrol is a general authority Washington law enforcement agency.

(2) "Limited authority Washington law enforcement agency" means any agency, political subdivision, or unit of local govern-

10.93.060. Privileges and immunities applicable

All of the privileges and immunities from liability, exemption from laws, ordinances, and rules, all pension, relief, disability, worker's compensation insurance, and other benefits which apply to the activity of officers, agents, or employees of any law enforcement agency when performing their respective functions within the territorial limits of their respective agencies shall apply to them and to their primary commissioning agencies to the same degree and extent while such persons are engaged in the performance of authorized functions and duties under this chapter. [1985 c 89 § 6.]

Library References

Municipal Corporations ⇐180 to 189(3).
Sheriffs and Constables ⇐28 to 76, 97.
WESTLAW Topic Nos. 268, 353.
C.J.S. Municipal Corporations §§ 450 to 502, 505, 508, 524.
C.J.S. Sheriffs and Constables §§ 107 to 113, 469 to 513.

10.93.070. General authority peace officer—Powers of, circumstances

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

(1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;

(2) In response to an emergency involving an immediate threat to human life or property;

(3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;

(4) When the officer is transporting a prisoner;

(5) When the officer is executing an arrest warrant or search warrant; or

(6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

[1985 c 89 § 7.]

Library References

Municipal Corporations ⇐188.
Sheriffs and Constables ⇐86.
WESTLAW Topic Nos. 268, 353.
C.J.S. Municipal Corporations §§ 486, 487.
C.J.S. Sheriffs and Constables §§ 66 to 79.
Fresh pursuit and hot pursuit, see Wash.Prac. vol. 12, Ferguson, §§ 3126, 3127.
Jurisdictional and geographical limitations, see Wash.Prac. vol. 12, Ferguson, § 3109.
Officials who may arrest, see Wash. Prac. vol. 12, Ferguson, § 3108.

Notes of Decisions

---

1. Validity

Statute authorizing general authority peace officer to enforce traffic or criminal laws of state throughout territorial bounds of state upon prior written consent of sheriff or chief of police in primary territorial jurisdiction where exercise of powers occurs was not unconstitutional due to alleged absence of standards for determining how public is to be notified with regard to when and to whom written consent is granted and as to how long such consent may remain in effect. Ghaffari v. Department of Licensing (1991) 62 Wash. App. 870, 816 P.2d 66, reconsideration denied, review denied 118 Wash.2d 1019, 827 P.2d 1012.

2. In general

An arrest made beyond an arresting officer's jurisdiction is equivalent to an arrest without probable cause, violating constitutional requirement that police officers act under lawful authority. State v. Plaggemeier (1999) 93 Wash. App. 472, 969 P.2d 519, review denied 137 Wash.2d 1036, 980 P.2d 1282.

3. Construction with other laws

Statute allowing police officer who has authority to make an arrest may proceed in fresh pursuit, and defining such pursuit to include, "without limitation," fresh pursuit as defined by common law, means that courts are not limited by the common law definition, but may consider the Legislature's overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable. City of Tacoma v. Durham (1999) 95 Wash.App. 876, 978 P.2d 514, as amended.

Fresh pursuit is a more flexible doctrine under statute governing such circumstances than it was at common law. City of Tacoma v. Durham (1999) 95 Wash.App. 876, 978 P.2d 514, as amended.

Valid portion of mutual aid agreement among law enforcement agencies, consenting to extrajurisdictional law enforcement, was severable from portion of agreement establishing an administrative body and policies among the different agencies, which was invalid in absence of legislative ratification under the Interlocal Cooperation Act; the administrative and consent portions of the